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CORPORATE GOVERNANCE AND EMPLOYEES IN SOUTH AFRICA

ABSTRACT

Focusing on employees as stakeholders, we analyse corporate governance initiatives in South Africa encouraging and requiring companies to look beyond their shareholders' interests. Successive non-binding Codes and the provisions of the recent Companies Act 2008 promoting this have been lauded by many commentators. The Companies Act 2008 provides certain opportunities for employees and their representatives to exercise influence at the margins. We nevertheless question how far current corporate governance initiatives are adequate to promote employee interests. On the basis of three case studies of how companies have responded to employees as stakeholders, we conclude that in fact more stringent regulation is required.

1. INTRODUCTION

Although not universally accepted, the argument that companies have responsibilities beyond those to shareholders is now common both globally and in South African public discussion.¹

¹ The article builds upon previous work by one of the authors, Miles, L. & Jones, M. "The Prospects for Corporate Governance Operating as a Vehicle for Social Change in South Africa" (2009), *Deakin Law Review*, 14, 1, 53 – 77. For arguments along 'the business of business' lines see the following: Friedman, M. (1998), "The social responsibility of business is to increase its profits", *New York Times Magazine*, September 13, 1970, at <<http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.friedman.dunn.pdf>>, Sternberg, E. (1997) "The Defects of Stakeholder Theory", *Corporate Governance*, 5, 1,

In South Africa, this is a particularly pertinent discourse in view of the strong social and economic challenges facing the country, a fragmented and disparate society marked by extreme contrasts. On the one hand it boasts a highly developed infrastructure and economy on a par with most developed nations, but on the other it faces high unemployment, a severe housing shortage, environmental degradation, spiralling violent crime, low skills levels and one of the worst HIV/AIDS epidemics in the world.² The argument advanced by some influential economists, that national economic development must take social justice into account, appears especially relevant in this context.³

The South African debate is part of a wider one and concerns the extent to which companies should contribute to developmental agendas and how far they should simply follow a narrower definition of their own interests. The idea that companies have wide social responsibilities is not new – indeed, it has engaged the interest of academics since the 1980s⁴ and

3 – 10, Jensen, MC. (2001) “Value Maximization, Stakeholder Theory, and the Corporate Objective Function”, *Journal of Applied Corporate Finance*, 14, 3, 8 – 21, Coelho, PRP, McClure, JE and Spry, JA (2003) “The Social Responsibility of Corporate Management: A Classical Critique”, *Mid-American Journal of Business*, 18, 1, 15 – 24, Sundaram, A. & Inkpen, A. (2004), “The corporate objective revisited” *Organization Science*, 15, 3, 350 – 363

² Hamann, R. (2006), “Can business make decisive contributions to development? Towards a Research Agenda on Corporate Citizenship and Beyond”, *Development Southern Africa*, 23, 2: 175 – 195, at 180, UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review - South Africa*, 23 May 2008, A/HRC/8/32; A/HRC/WG.6/1/ZAF/4, available at <<http://www.unhcr.org/refworld/docid/4857aa23d.html>>

³ Elliott, KA & Freeman, RB, *Can Labour Standards Improve Under Globalization?* Washington, Institute for International Economics, 2003.

⁴ In particular, see Freeman, RE (1994), “The Politics of Stakeholder Theory: Some Future Directions” *Business Ethics Quarterly*, 4, 4, 409 –

has been heavily promoted by international organisations such as the UN,⁵ the World Business Council for Sustainable Development⁶ and the World Economic Forum.⁷ These bodies have long campaigned for companies to behave as good ‘corporate citizens’, be more inclusive in their approach and to discharge their responsibilities to the wider community.⁸

We examine official codes, advice and hard law in South African corporate governance prompting companies to look beyond the interests of their shareholders, and question how far they are likely to suffice to meet deep socio-economic challenges. We do so with special reference to employees as stakeholders.

421, Donaldson, T. & Preston, LE. (1995) “The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications” *The Academy of Management Review*, 20, 1, 65 – 91, Freeman, RE & Evan, W. (1990), “Corporate governance: A stakeholder interpretation” *Journal of Behavioural Economics*, 19, 4, 337–359, Phillips, R. (1997), “Stakeholder theory and a principle of fairness. *Business Ethics Quarterly*, 7, 51 – 66, Phillips, R. & Reichart, J. (1998), “The environment as a stakeholder: A fairness-based Approach” *Journal of Business Ethics*, 23, 185 – 197, Goodpaster, K. (1991), “Business ethics and stakeholder analysis”, *Business Ethics Quarterly*, 1, 1, 53 – 73, Clarkson, M. (1995) “A stakeholder framework for analyzing and evaluating corporate social performance”, *Academy of Management Review*, 20, 92 – 117, Mitchell, R. Agle, B. & Wood, D. (1997), “Toward a theory of stakeholder identification and salience: Defining the principle of who and what really counts”, *Academy of Management Review*, 22, 853 – 886.

⁵ See for example, the UN Global Compact Principles at <<http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index.html>>

⁶ Their website may be consulted at <<http://www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?MenuID=1>>

⁷ See <<http://www.weforum.org/en/index.htm>>.

⁸ See for example Economic Commission for Africa, “An Overview of corporate governance and accountability in Southern Africa” 2007, 1 – 34, at 11, at <<http://www.uneca.org/srdc/sa/publications/CorporateGovernance-Accountability-SA.pdf>> .

The article is structured as follows. Part 2 describes the South African corporate governance framework and discusses the recently highlighted ‘inclusive approach’, in recognising the interests of a wide group of stakeholders (as they are described in South African post-Apartheid public discussion), and its embodiment in law, codes and official guidance. It concludes by arguing that the conditions required to facilitate an ‘inclusive approach’ in South Africa are in fact either underdeveloped or absent. Part 3 presents three case studies in areas of central interest to employees. Part 4 concludes, arguing that that the state will be forced to increase its regulatory involvement if employee needs are to be met.

2. THE SOUTH AFRICAN CORPORATE GOVERNANCE FRAMEWORK

2.1 INTRODUCTION

Historically, the South African corporate governance framework has mirrored that in the UK. The corporate governance regime is characterised by a unitary board system, a reliance on capital markets to raise finance, a strong legal framework to protect shareholder rights and a set of self-regulatory measures designed to shape management behaviour. As in the UK, two regimes exist in relation to corporate governance law: first, legal sources (company legislation and case law), and second, a system of (non-binding) codes of best practice to guide corporate behaviour.⁹

⁹ For a useful discussion of the corporate governance regime in South Africa, see Aka, PC. (2007) “Corporate Governance in South Africa: Analysing the Dynamics of Corporate Governance Reforms in the ‘Rainbow Nation’” *North Carolina Journal of International Law and*

The South African government adopted new approaches to economic development after the end of apartheid in 1994. Central to these initiatives was its ‘social contract’ with civil society, the corporate sector and organised labour to generate the requisite domestic capital as well as to re-invigorate the economy.¹⁰ Companies were expected by government to play a role in meeting the socio-economic challenges facing the country. This idea gained the support of many South African academics who believed that the involvement of companies in meeting these challenges was not only compatible with traditional African values but was also fundamental to long term corporate success and might constitute a model for the African continent.¹¹

Commercial Regulation, 33, 2, 219 – 292 and West, A. (2006), “Theorising South Africa’s Corporate Governance’ *Journal of Business Ethics*, 68, 4, 433 – 448.

¹⁰ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review - South Africa*, 23 May 2008, A/HRC/8/32; A/HRC/WG.6/1/ZAF/4, available at <http://www.unhcr.org/refworld/docid/4857aa23d.html>

¹¹ See Andreasson, S. (2009), “Understanding corporate governance reform in South Africa: Anglo-American divergence, the King Reports and hybridization” at http://works.bepress.com/stefan_andreasson/8 , West, A. (2006), “Theorising South Africa’s corporate governance”, *Journal of Business Ethics*, 68, 433 – 448, Vaughn, M. & Ryan, LV (2006), “Corporate governance in South Africa: a bellwether for the continent?” *Corporate Governance*, 14, 5, 504 – 512, Visser, W. *Business Frontiers, Social Responsibility, Sustainable Development and Economic Justice*, (2005), ICFAI Books, Chapter 25, Rossouw, GJ, van der Watt, A & Malan, DP, (2002), “Corporate Governance in South Africa” *Journal of Business Ethics*, 37, 3, 289 – 302. King I, II and III all embrace concepts such as sustainability and business ethics and are underpinned by the principles of community, sharing and generosity (also known as the South African Ubuntu concept). See Karsten, L. & Illa, H. “Ubuntu as a key African management concept: contextual background and practical insights for knowledge application” *Journal of Managerial Psychology*, (2005), 20, 7, 607 – 620 and Lutz, D. “African Ubuntu Philosophy and Global Management” *Journal of Business Ethics*, 2009, 84, 3, 313 – 328

The government therefore sought to influence how companies defined their interests. It has recognised that these interests were not self-evident to actors within companies themselves. Nor are they in reality defined in isolation, but rather through internal and external negotiation processes.¹² Its approach to setting the legal parameters for these processes has sought to influence companies through both ‘hard’ and ‘soft’ means.

2.2 THE COMPANIES ACT AND THE ‘INCLUSIVE APPROACH’

Traditionally, South African company law concentrated on the shareholder wealth maximisation approach and required directors to exercise their powers for the benefit of the company as a whole.¹³ The interests of the company were often synonymous with those of shareholders. Thus, directors had no legal duty to consider the interests of employees, creditors, suppliers or society, except in very limited circumstances, such

which discuss Ubuntu as a theory of management consistent with South African values.

¹² Hay, C. “Constructivist institutionalism...Or, why ideas into interests don’t go.” Paper presented to the American Political Science Association Philadelphia 31 August, 2006, at <www.allacademic.com/meta/p152815>. Hay, C., ‘Political Ontology’ in R.E. Goodin and C. Tilly (eds.) *The Oxford Handbook of Contextual Political Analysis*, Oxford: Oxford University Press, 2006.

¹³ The duties of directors are regulated by statute e.g. ss234–240 Companies Act 1973 which deal with the disclosure of conflict of interests that a director may have in a contract, and the common law (fiduciary duties of good faith (duty to prevent a conflict of interests, not exceed the limitation of their powers, maintain an unfettered discretion and exercise their powers for the purpose for which they were conferred), and the duty to act with the necessary care and skill when performing his or her duties. For case law, see, for example, *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 (5) SA 550 (SCA), *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C), *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T).

as in the case of company insolvency.¹⁴ The recent reform of South African company law, outlined in a policy paper entitled *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform 2004*,¹⁵ sought to change this. It posited a move away from the traditional model toward the concept of “enlightened shareholder value”, following developments in the UK in this regard. The South African Department of Trade and Industry (DTI) formulated a new approach to corporate governance:

*‘A company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies’*¹⁶

This endorsed the approach taken in successive King Reports (discussed in more detail in the next section) that the company is a social as well as an economic institution and that its pursuit

¹⁴ Readers will benefit particularly from referring to Aka (2007), Andreasson (2009) and West (2006), which provide helpful discussions with regard to the South African corporate governance framework. This is based on that in the UK, which has traditionally concentrated on shareholder interests. The authors discuss how this emphasis has evolved and consider the tone of recent academic debate on this matter.

¹⁵ The South African Department of Trade and Industry released the paper to set out the basis for a redraft of its Companies Act 1973. The intention was to bring the law into line with 21st century requirements, and to ensure a framework which will promote growth, good governance, confidence and competitiveness. The paper can be viewed at <http://us-cdn.creamermedia.co.za/assets/articles/attachments/01326_notice1183.pdf>

¹⁶ Ibid. at 24 – 25. Specific reference to the UK approach was made in the 2004 policy paper (pp. 19, 20, 22). The new approach would compel directors to have regard, where appropriate, to the interests of stakeholders, but with shareholders’ interests nevertheless retaining primacy.

of economic objectives should be constrained by social and environmental imperatives. This new formulation has passed into the recent Companies Act 2008. That Act was approved by Parliament and the National Council of Provinces (NCOP) and is expected to be effective in July 2010.¹⁷

Section 76 of the Act spells out the duties of directors. This codification of the duties of directors is a new development as its predecessor, the Companies Act 1973, did not contain clear guidance regarding the duties and liabilities of directors, with the result that these issues were governed by the common law and soft corporate governance codes. However, the new Act fell short of legislating on the precise content of the duty of directors, limiting itself to stating that:

A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—
(a) in good faith and for a proper purpose;
(b) in the best interests of the company; and
(c) with the degree of care, skill and diligence that may reasonably be expected of a person—
(i) carrying out the same functions in relation to the company as those carried out by that director; and
(ii) having the general knowledge, skill and experience of that director.

The intention was for the judiciary to delineate the ambit of s76 through the development of common law. The weight given, over the years, to the ‘inclusive approach’ ‘corporate citizenship’ and ‘corporate social responsibility’ in King I, II and III (indeed, the drafting of King III was undertaken

¹⁷ This can be viewed at

approximately at the same time as the Companies Act 2008) seems likely significantly to influence the interpretation of this duty. It will be interesting to see the extent to which the willingness of the judiciary in South Africa to do so develops.

The new Act however, contains provisions of *direct* relevance to stakeholders, allowing them to intervene directly when their interests are harmed. In relation to employees, these exist in three key areas: (a) director delinquency and probation, (b) business rescue proceedings ('administration') and (c) the commencement of derivative actions. In the first area, an application can be made to the court by unions or other employee representatives for a director to be declared delinquent or placed on probation. Section 162 lists a number of circumstances where a declaration must be made. These include (i) where the directors has grossly abused his position, (ii) intentionally or by gross negligence inflicted harm upon the company, or (iii) acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust.¹⁸ Similarly, a court may make an order placing a director on probation if, *inter alia*, he acted in a manner materially inconsistent with his duties as a director. Specified punitive and remedial actions may follow on a declaration of delinquency or probation.¹⁹

<http://www.saica.co.za/Portals/0/Technical/act71_2008.pdf>

¹⁸ s162(5) Companies Act 2008

¹⁹ s162(10). These include the director having to undertake a designated programme of remedial education, carrying out a designated programme of community service, paying compensation to any person adversely affected by his conduct, be supervised by a mentor in any future participation as a director while the order remains in force; or be limited to serving as a director of a private company, or of a company of which that person is the

In the second area, business rescue proceedings can be invoked by an ‘affected person’. Section 128 of the Act provides that an ‘affected person’ includes employees, their trade union or any other representative. The Act recognises the interests of these affected persons, and provides for their extensive participation in the development and approval of a business rescue plan.²⁰ Importantly, during business rescue proceedings, employees of the company must continue to be employed on the same terms and conditions as formerly – notwithstanding any provision of an agreement to the contrary.²¹

In the third area, the Companies Act 2008 provides an opportunity not only for shareholders, but for the first time, other stakeholders (including employees) to commence derivative actions against the board.²² This is much broader than the equivalent UK provision, which limits the opportunity to commence such actions to shareholders only.²³ The ability to bring a derivative action is a significant tool which constitutes a last resort mechanism for holding directors accountable for certain actions, even where they enjoyed the support of the majority of shareholders.²⁴

sole shareholder. If a director is declared delinquent, this may subsist for 7 years, whereas an order for probation, for 5 years.

²⁰ s150-154 Companies Act 2008

²¹ s136 Companies Act 2008

²² s165 Companies Act 2008

²³ See ss260-264 UK Companies Act 2006

²⁴ s165(14) Companies Act 2008. See also C Stein, “Big business beware – the class and derivative actions are coming!” at <<http://www.legal500.com/c/south-africa/developments/8676>>

These provisions certainly provide employees and their representatives with leverage possibilities at the extremes of director behavior. In the case of director delinquency, they give employee representatives the right to threaten a director's position and thereby to exercise some influence. In the case of businesses in crisis (particularly relevant in the current global situation) they give employees the possibility of either delaying redundancies and/or of launching alternative plans for business rescue. In both areas, employees and representative employee institutions are provided with possibilities for actively enforcing certain standards of corporate conduct, within significant albeit limited fields. Finally, the opportunity for employees to commence derivative actions in respect of wrongs committed against the company which the company is not willing to pursue in its own right, provides a powerful tool for employees to intervene when the wrong committed against the company also harmed their interests.

2.3 SOFT LAW: NON-LEGAL CODES AND THE 'INCLUSIVE APPROACH'

Considerably more attention has, over the years, been given to stakeholders in various non-binding corporate governance codes of practice (soft law) in South Africa. They date back to 1994 and were part of the post-apartheid mandate to rebuild the economy. These Codes, King I (1994), II (2002) and III (2009) progressively developed the idea of an 'inclusive approach' to corporate governance as outlined above. With the new

Companies Act 2008 coming into force, these Codes can establish a framework within which the courts can interpret the directors' duties. Reliance on non-binding Codes of Practice to give meaning to the duties of directors is not new – the English courts for example, give considerable weight to provisions of the Combined Code (despite its non binding nature) in determining the nature of duties of directors under the law.²⁵ South African courts can similarly delineate the ambit of s76 with the help of the King Codes. Exactly how this will evolve will of course depend on judicial will to take an active role in interpreting and developing the newly codified duty in a way which is receptive and sympathetic to stakeholder interests.²⁶

The first Code of Corporate Governance, King I, published in 1994 by the Department of Trade and Industry²⁷ set out the

²⁵ The way the UK courts have done this is demonstrated in Goulding, S., Miles, L. & Schall, A. "Judicial Enforcement of Extra-Legal Codes in UK and German Company Law – Including Observations on OLG Schleswig-Holstein" NZG 2004, 669 (Mobilcom II) and LG Muenchen I, NZG 2004, 626 (Hypovereinsbank), European Company and Financial Law Review, (2005), Vol 2(1), 20-62.

²⁶ There is evidence that South African courts are moving in this direction in environmental matters. See *Minister of Water and Forestry v Stilfontein Gold Mining* 2006 (5) SA 333 (W), where company directors had refused to comply with an order from the Ministry to drain water from a mine on health and safety grounds, arguing that it was not possible for the company to comply with the directives and still remain financially viable. The court judged that their conduct flew in the face of what was recommended in the code of corporate practices and conduct recommended by the King Committee when the South African corporate community had, widely and uniformly, endorsed their findings and recommendations. The King Committee had all along stressed that one of the characteristics of good corporate governance was social responsibility. The directors were ordered to comply with the order. The case can be read at <<http://www.saflii.org/za/cases/ZAGPHC/2006/260.html>> see in particular Paragraphs 16.7 – 16.9 where reference is made to King II.

²⁷ See P Armstrong (1995) "The King Report on Corporate Governance" *Juta's Business Law*, 3, 65–70.

potential direction of corporate governance post-apartheid. Despite incorporating a code based on that in the UK – with an emphasis on shareholder protection – it urged a participative corporate governance system, articulating a need for companies to recognise that they no longer acted independently from the society and environment in which they operated.²⁸ King II, published in 2002, took this ‘inclusive approach’ further,²⁹ recommending the introduction of ‘triple bottom line’ reporting.³⁰ It re-iterated the stance taken in King I, stressing that companies must recognise that they did not act independently from the societies in which they operated. Indeed, any exclusion of stakeholders would run counter to the traditional African values of co-existence, collectiveness and

²⁸ King I was recognised internationally, when published, as the most comprehensive publication on the subject embracing an inclusive approach to corporate governance. See <http://www.iodsa.co.za/king.asp#King%20I%20Report%20-%201994> . See T Mongalo, (2004), “South Africanising Company law for a Modern Global Economy” *South African Law Journal*, 93 – 116, at 114. For example, King I provides in Chapter 20, Paragraph 13, that a company’s code of ethics should “...Be developed in such a way as to involve all its stakeholders to infuse its culture...” See http://www.ecgi.org/codes/documents/king_i_sa.pdf

²⁹ King II recognised that companies are increasingly expected to behave as good corporate citizens, due to their influence over stakeholders such as employees, communities and the environment. Companies rely on these stakeholders to sustain their operations and for maintaining their license to operate. Therefore, they must acquire a sound understanding of their responsibilities to stakeholders. King II recommends that every company should report annually on their policies and practices pertaining to how the interests of stakeholders are met. Implementing the ‘inclusive approach’ will mean companies must define their purpose, identify the values by which they carry out their activities and communicate these to stakeholders. These three factors should be combined in developing strategies to achieve the company’s aim to be sustainable in the long-run. See Paragraphs 5.3, 6, 35, and 37 of the Executive Summary of the King II Report, (pages 7 and 17) at <http://www.ukzn.ac.za/ukznms/King-ReportExec-sum.pdf>.

³⁰ Principle 5 of King II Code

consensus.³¹ Thus, when developing company strategy, corporate governance should extend to the non-financial aspects of operations such as the promotion of black empowerment and environmental protection together with the advancement of social equality. This theme was endorsed in King III (February 2009)³², which stated that it ‘seeks to emphasise the inclusive approach of governance.’³³ In fact, King III is particularly significant because it explicitly explained that the ‘inclusive approach’ went further than the ‘enlightened shareholder value’ model adopted in the UK.

Under the UK model, the legitimate interests and expectations of stakeholders are *de jure* secondary. Stakeholders are generally only considered in so far as it would be in the interests of shareholders to do so.³⁴ The board of directors should consider the legitimate interests and expectations of stakeholders but merely as an instrument to serve shareholders’s interests. By contrast, King III provides that shareholders do not have a *predetermined* place of precedence over other stakeholders. In fact, the interests of any stakeholder *may* be

³¹ Paragraph 38 of the Executive Summary of the King II Report, (pages 17 & 18)

³² King III (Report) can be viewed at <<http://african.ipapercms.dk/IOD/KINGIII/kingiiiireport/>> . The Code can be viewed at <<http://african.ipapercms.dk/IOD/KINGIII/kingiiicode/>>. King III will be effective from 1 March 2010 and until then, King II will apply.

³³ Page 11 of King III Code

³⁴ S 172 of the UK Companies Act 2006. One of the authors has discussed the development of this duty in the UK in detail, see Schall, A. Miles, L. & Goulding, S. “Enhancing the interests of non-member stakeholders through disclosure: The new reporting regime in the United Kingdom” *Journal of Corporate Law Studies*, (2006), 6, 2, 299 – 328 for a discussion of the potential impact the new law on directors.

given precedence based on what is believed to serve the best interests of the company at any particular point. Importantly, the best interests of the company should be interpreted within the parameters of the company as a sustainable enterprise and as a responsible corporate citizen. King III believed that this approach would give effect to the notion of redefining success in terms of lasting positive effects for all stakeholders.³⁵

Last but not least, King II and III required that the fulfilment of companies' obligations to stakeholders must be measured, calculated, audited and reported in the same way as their financial performance. King II required companies to implement 'sustainability reporting' as a core aspect of corporate governance. King III went further, in that whereas in the past such reporting could be done separately from and in addition to financial reporting, it should now be integrated with the latter.³⁶ Thus it stated in Chapter 9 that *'Sustainability reporting and disclosure should be integrated with the company's financial reporting'* and that *'Reporting effectively about the goals and strategies of the company, as well as its performance with regard to economic, social and environmental issues, also serves to align the company with the legitimate interests and expectations of its stakeholders, and at the same time, obtain stakeholder buy in and support for the objectives that the company is pursuing. This support can prove to be invaluable during difficult times, for example, when the company needs certain approvals or authority, or when it needs*

³⁵ Page 12 of King III Code

*and relies on the confidence and loyalty of customers.’*³⁷ It further provided that sustainability reporting and disclosure ‘...*should be independently assured*’ and that ‘*General oversight and reporting of sustainability should be delegated by the board to the audit committee*’.³⁸ This is now widely described as ‘triple bottom line reporting’.

The benefits of ‘triple bottom line’ reporting³⁹ have been judged to be many. It has been suggested that it provides the company with incentives to enhance its social performance, emphasises the company’s positive actions, signifies its respect for ‘CSR’ and demonstrates its legitimacy before stakeholders.⁴⁰ It is also held to facilitate stakeholder engagement and to make information available which can become the basis of ongoing stakeholder communication.⁴¹ Finally, it is suggested that if stakeholders were given the information they need, they would be empowered to hold companies accountable for their actions, through exerting pressure and negotiating with them.⁴² The

³⁶ King III Report, Principle 9.2, at 109

³⁷ King III Report, at 108

³⁸ King III Report, Principle 9.3, at 110. There was no such requirement in King II.

³⁹ King did not use the words ‘triple bottom line’ reporting, using instead ‘integrated sustainability reporting’. However both kinds of reporting refer to the same issues, namely economic, social and environmental performance.

⁴⁰ C Dawkins & FW Ngunjiri, “Corporate Social Responsibility Reporting In South Africa: A Descriptive and Comparative Analysis”, *Journal of Business Communication*, 2008, 45, 3, 286 – 307, at 288 – 289.

⁴¹ M Painter Morland, (2006) “TBL as social grammar: Integrating CSR and Corporate Codes of Conduct” *Business Ethics: A European Review*, 15, 4, 352 – 364, at 358.

⁴² See Gunningham, N, Kagan, R. & Thornton, D. (2004), “Social License and Environmental Protection: Why Businesses Go Beyond Compliance”, *Law & Social Inquiry*, 29, 307 – 341, which discusses how stakeholders

prospect of ‘triple bottom line’ reporting contributing to the welfare of stakeholders is regarded as a contemporary and exciting notion. Since its inception, the term has spread ‘like wild fire’⁴³ and has been embraced enthusiastically by stakeholder organisations, ‘ethical’ investment funds, accounting firms⁴⁴, multinationals, governments and academia.⁴⁵

Some incentives exist for companies to realise these aspirations. Despite the non-binding nature of the King Codes, the Johannesburg Securities Exchange requires as a condition of listing that companies must comply with their provisions.

can exploit the corporate ‘social license’ in order to compel companies to improve their environmental performance.

⁴³ Norman, W. & McDonald, C. (2004), “Getting to the Bottom of TBL” *Business Ethics Quarterly*, 14, 2, 243 – 262, at 244.

⁴⁴ See for example, the KPMG International Survey of Corporate Sustainability Reporting 2008, at <http://www.kpmg.com/SiteCollectionDocuments/International-corporate-responsibility-survey-2008.pdf>, which is regarded as the most comprehensive conducted on this subject to date. It examined reporting trends among the world’s largest companies. The sixth in a series conducted by KPMG and various partners since 1993 it is issued every three years. 22 of KPMG’s member firms voluntarily participated in this study including: Australia, Brazil, Canada, Czech Republic, Denmark, Finland, France, Hungary, Italy, Japan, Mexico, Norway, Portugal, Romania, South Africa, South Korea, Spain, Sweden, Switzerland, The Netherlands, United Kingdom, and the United States. See <http://www.csrwire.com/News/13565.html>.

⁴⁵ Readers may wish to consult A Henriques & J Richardson, *The Triple Bottom Line: Does it All Add Up? - Assessing the Sustainability of Business and CSR*, 2004, (Earthscan: UK), A Savitz & K Weber, *The Triple Bottom Line: How Today's Best-run Companies Are Achieving Economic, Social and Environmental Success - And How You Can Too*, 2006, (Jossey Bass: San Francisco) and B Willard, *The Sustainability Advantage: Seven Business Case Benefits of a Triple Bottom Line (Conscientious Commerce)*, 2002, (New Society Publishers: Canada), which explore the use of TBL reporting and discusses how companies have used TBL concepts to address sustainability issues to good effect.

Those who do not do so run the risk of damaging their reputations and share prices and, ultimately, of being de-listed. So, now, under King III, where companies have applied the Code and best practice recommendations, they must state this positively to their stakeholders. Where a specific principle or recommendation has not been applied, the board must explain the reasons. In short, the approach is, in the Code's terms, 'apply or explain'. This will, in theory at least, allow stakeholders to comment on and challenge the board to improve the standard of governance.⁴⁶

2.4 DOES 'TRIPLE BOTTOM LINE' REPORTING PROMOTE AN 'INCLUSIVE APPROACH'?

Whether 'triple bottom line' reporting as an accounting concept actually ensures that the interests of stakeholders are adequately taken into account is questionable. A vast body of research argues that such reporting is neither reliable nor relevant. We deal briefly with these difficulties surrounding 'triple bottom line' reporting; one of the authors has addressed the issue extensively elsewhere.⁴⁷

⁴⁶ Pages 6 and 16 of King III Code

⁴⁷ See Miles, L. & Jones, M. "The Prospects for Corporate Governance Operating as a Vehicle for Social Change in South Africa" (2009), *Deakin Law Review*, 14, 1, 53 – 77. See also Hess, D. (2007) "Social Reporting And New Governance Regulation: The Prospects Of Achieving Corporate Accountability Through Transparency" *Business Ethics Quarterly*, 17, 3, 453 – 476, Robins, F. (2006), "The Challenge of TBL: A Responsibility to Whom?" *Business and Society Review*, 111, 1, 1 – 14, Norman, W. & MacDonald, C. (2004), Berthelot, S. Cormier D. & Magnan, M. (2003), "Environmental Disclosure Research: Review and Synthesis", *Journal of Accounting Literature*, 22, 1 – 44.

The first difficulty is that ‘triple bottom line’ reporting cannot be measured or aggregated. In the absence of an (as yet) widely accepted methodology, it is impossible to quantify a company’s social or environmental performance in a way which reduces these to a bottom-line result.⁴⁸ For example, how does one interpret the following information in an annual report?

- (a) it is increasing the proportion of black employees by 5%,
- (b) it has cut down emissions by 10%,
- (c) it directed 22% of its budget to community-based programs,
- (d) 175 workers participated in its training programs, and
- (e) it invested R1.5 million into R&D addressing HIV/AIDS

Does the information prove that the company’s social and environmental bottom lines are improved? Have stakeholder concerns been met? Taken as a whole, what does it all mean? Answers to these questions can only be subjective, reflecting the personal values of the person judging them, rather than those of the stakeholders.⁴⁹ It is not possible adequately to measure benefits to society and the environment in monetary terms, as it is with financial profit, there being no direct social or environmental equivalents to revenue, expenses, losses, assets and liabilities.⁵⁰

⁴⁸ See Norman and MacDonald, (2004), 249 – 251

⁴⁹ R Price, *What Triple Bottom Line?: Actually, It’s All Social* <<http://www.kiriganai.com.au/attachments/publications/What%20Triple%20Bottom%20Line%20-%20It%27s%20all%20Social.pdf>> at 23 June 2009.

⁵⁰ See F Robins, (2006), at 1- 2, Norman & MacDonald, (2004), at 250.

It has been argued that ‘triple bottom line’ reporting simply allows companies to make vague commitments to social and environmental concerns. As there is no real benchmark to measure their performance against, companies do not have to be concerned about being compared to others in the same industry or whether their social and environmental bottom lines have shown declining performance over the years.⁵¹

Evidence to date demonstrates that reporting requirements have in fact done little to meet stakeholder needs. The Socially Responsible Investment (SRI) Index of the Johannesburg Securities Exchange (membership of the Index is dependent on companies’ performance of their ‘triple bottom line’ obligations) is an important influence on shareholder perceptions. A paper on the index’s functioning in practice shows that companies participating in the assessment process merely described their sustainability process in an ‘aspirational and anecdotal manner’, and ‘in a general, rather than objective and direct manner’.⁵² Some companies have scored themselves highly despite their poor commitment to stakeholder issues.⁵³ Few have committed themselves to achieving specific targets or reporting their performance against these targets. Research shows that the

⁵¹ See Norman & McDonald, (2004), at 256

⁵² D Sonnenberg & R Hamann, (2006), “The JSE Socially Responsible Investment Index and the State of Sustainability Reporting in South Africa” *Development Southern Africa*, 23, 2, 305 – 320

⁵³ Bond, P. (2008) “Social Movements and CSR in South Africa” *Development and Change*, 39, 6, 1037 - 1052 which discusses that having lost confidence in the state regulation and CSR, civil society in South Africa are themselves tackling corporate power and facilitating change.

Index is poorly monitored⁵⁴ and that there is little comparative or quantitative information. Finally, only a small proportion of companies have submitted their sustainability reporting to independent auditors. The KPMG International Survey of Corporate Responsibility Reporting 2008 referred to above showed that although 86% of companies in South Africa practised some sustainability reporting, only 15% sought external verification of these reports, although this is now set to change, because King III requires companies to subject such reporting to independent verification.

2.5 BEYOND TRIPLE BOTTOM LINE REPORTING?

An obvious subsequent question is how the ‘inclusive approach’ can in practice be implemented beyond ‘triple bottom line reporting’. Even if triple bottom line reporting can be ‘a vital source of moral resuscitation in business life’, as has been claimed, it is still dependent for its success on stakeholder engagement, organisational integrity and stakeholder activism.⁵⁵ These all require that stakeholders have adequate resources and experience to enter into dialogue with companies, that there is an active stakeholder culture in society and that companies are willing to work with them to find optimal solutions. In the South African context, the existence of these conditions cannot be taken for granted.⁵⁶

See also P Newell “Citizenship, Accountability and Community: The Limits of the CSR Agenda” *International Affairs*, 2005, 81, 3, 541 – 557.

⁵⁴ Bond, (2008), at 1038.

⁵⁵ See M Painter-Morland, (2006), at 353

⁵⁶ See Fig. D. (2005), “Manufacturing Amnesia: CSR in South Africa” *International Affairs*, 81, 3, 599 – 617, at 612 – 614

Suggestions as to how stakeholder engagement can be achieved range from the adoption of formal corporate governance mechanisms – for example, appointing stakeholders on to the board⁵⁷ – to less formal methods such as entering into partnerships and collaborative ventures with stakeholders. Whichever method is envisaged as most appropriate, critical challenges such as how the company’s social responsibilities can be integrated successfully into its corporate governance regime, identifying who the relevant stakeholders are, understanding their needs, how openness and transparency can be promoted and how conflict can be managed will need to be met.⁵⁸

⁵⁷ Ayuson, S. & Argandona, A. “Responsible Corporate Governance: Towards a Stakeholder Board of Directors?” IESE Business School Working Paper No 701, July 2007, University of Navarra, at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349090> , Spisto, M. (2005) “Unitary Board or Two Tier Board for the New South Africa?” *International Review of Business Research Papers*, 1, 2, 84 – 99

⁵⁸ The general literature on forming partnerships with stakeholders is extensive – but see in particular, Waddock, S. (2001), “Integrity and Mindfulness: Foundations of Corporate Citizenship” *Journal of Corporate Citizenship*, 1, 25 – 37, Payne, SL. & Calton, JM. (2002), “Towards a Managerial Practice of Stakeholder Engagement: Developing Multi Stakeholder Learning Dialogues” in Rahman, SS. Waddock, S. Andriof, J. & Husted, B. (eds.) *Unfolding Stakeholder Thinking: Theory, Responsibility and Engagement*, Sheffield: Greenleaf, 121 – 136, Painter-Morland, M. “TBL Reporting as Social Grammar: Integrating CSR and Corporate Codes of Conduct” *Business Ethics: A European Review*, 2006, 15(4), 352 – 364, Burchell, J. & Cook, J. (2006), “Assessing the impact of stakeholder dialogue: changing relationships between NGOs and companies”, *Journal of Public Affairs*, 6, 3-4, 210 – 227, Burchell, J. & Cook, J. (2008), “Stakeholder Dialogue and Organisational Learning: Changing Relationships between Companies and NGOs,” *Business Ethics: A European Review*, 17, 1, 35 – 46.

Stakeholder engagement requires an environment and mechanisms which enable companies and their stakeholders to manage and sustain their interactions. In many developed countries, stable economic and legal environments enable these to be managed relatively harmoniously. In such countries, a legal framework to resolve conflicts often exists and the media can play an effective role in highlighting company practices. Stakeholder groups may be well resourced and possess experience of dealing with companies.⁵⁹

In developing countries however, relations between companies and their stakeholders are less likely to be managed in such ways. In the South African case, as in many others, attracting foreign business and investment in order to enable economic growth often dominates political agendas, and stakeholder needs may therefore recede in importance. Stakeholders' ability to challenge company actions is often hampered by weak experience and resources, a lack of legal literacy, a distrust of legal processes and in some cases intimidation by the authorities.⁶⁰ Where stakeholders lack the resources and

⁵⁹ Readers are referred to Parades, T. (2004), "A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer" *William and Mary Law Review*, 45, 3, 1055 – 1158 which discusses in detail the fundamental differences in the formal and information institutions in developed and developing countries and argues that it is misguided to expect corporate governance in countries in which these institutions are less developed to function in the same manner as that in developed countries. We apply the same arguments in the context of stakeholder engagement.

⁶⁰ Lund Thomsen, P. "Corporate Accountability in South Africa: The Role of Community Mobilising in Environmental governance" *International Affairs*, 2005, 81(3), 619 – 633, at 630 – 631 and Hamann, R. & Acutt, N. (2003) "How Should Civil society and the government respond to 'CSR'?"

experience to represent themselves, problems are likely to arise in calling companies to account for their actions or inactions. The argument that ‘corporate morality pays’ – typically deployed in developed countries – is likely to ring hollow in such circumstances.

We now turn to examine key issues for South African employees and show the limitations of corporate action in addressing the considerable problems which employees face.

3. CASE STUDIES

3.1 INTRODUCTION

The case studies in this section demonstrate some of the key issues for employees in South Africa and indeed more widely on the continent. They have been chosen to illustrate central socio-economic challenges which the corporate sector can help tackle. The widespread failure of the corporate sector to resolve issues, or, (as in the exceptional case of Anglo American immediately below) the contingency of their partial success in these major areas underpins the argument which we develop below: that the state must strengthen its regulatory capacity.

3.2 THE EMPLOYEE HIV/AIDS EPIDEMIC: AN UNEVEN CORPORATE RESPONSE

South Africa has the largest number of HIV infected people in the world, and HIV/AIDS is the single largest cause of premature death in the country. It is estimated that approximately 16% of the South African population is infected

A critique of business motivations and the potential for partnerships”
Development Southern Africa, 20, 2, 255 – 270 at 265 – 266

with HIV.⁶¹ Management of the disease is particularly pertinent in the mining and extractive industries. The mining industry is crucial to South Africa, with precious metals contributing 65% to the country's mineral export earnings and 21% of total exports of goods in 2006. South Africa supplies about 80% of the world's platinum. The industry is also South Africa's biggest employer, with around 460, 000 employees and another 400, 000 employed by suppliers of goods and services to the industry. With a quarter of mine workers affected by HIV/AIDS, mining operations suffer through illness, absenteeism, low productivity and untimely deaths unless the epidemic is effectively managed.⁶² The need for companies to manage HIV/AIDS thus transcends altruism.⁶³ Companies such as Anglo American PLC, BHP Billiton, Xstrata, Eskom, De Beers and SAPREF, have all introduced programs to combat HIV/AIDS – ranging from education and prevention, to testing, counselling, medical care and support, operating mobile clinics and health centres, to the provision of anti retroviral therapy.⁶⁴ Yet the scope of and investment in these schemes varies very considerably. Most of them have generally met with limited success.

⁶¹ Overseas Development Institute “AIDS and the Private Sector: The Case of South Africa” (2007), 1 – 4, at <http://www.odi.org.uk/resources/download/427.pdf>

⁶² See “Mining and Minerals in South Africa” (2008), at <http://www.southafrica.info/business/economy/sectors/mining.htm> and Fearnley, CJ. “HIV and AIDS risk management at Rustenburg Section, Anglo Platinum” (2005), *Applied Earth Science: IMM Transactions Section B*, 114, 3, 146 – 153

⁶³ Bolton, P. (2008) “Corporate Responses to HIV/AIDS: Experience and Leadership from South Africa” *Business and Society Review*, 113, 2, 277 – 300, at 277 – 278.

⁶⁴ Bolton, P. (2008), Fig. D. (2005), at 608 – 610.

However, more comprehensive initiatives taken by Anglo American plc exceptionally proved relatively successful in tackling the disease among their workers.⁶⁵ In 2009, Anglo American won the Global Business Coalition's Business Excellence Award for this programme. In this case, the companies' practice in South Africa was exported to other operations elsewhere on the continent.

Anglo American is an exceptional company in that, unlike its competitors, it played a role in opposition to Apartheid. The key factors identified for the successful initiative were very specific and included (i) a recognition that whilst the costs of tackling the disease was high, the long-term costs of low level involvement for the company would be even higher (ii) a recognition by the company of the need for involvement by national trade unions in devising a strategy for HIV/AIDS management (iii) crucially, the support given by international union partners to ensure the smooth facilitation of this collaboration (iv) The long history of cooperation between senior personnel in the company and the unions was central in enabling a holistic and sustained programme to be adopted. The willingness to include unions in its HIV/AIDS management programme brought major returns to the company's investment in the shape of increased productivity and profits and also in the

⁶⁵ Croucher, R & Cotton, E. *Global Unions, Global Business*, Middlesex University Press, 2009.

shape of huge increases in the take up of diagnosis and treatment by employees.⁶⁶

In other industries, such as construction, the position is less promising and an equivalent to the Anglo American plc case is lacking. The response in construction has simply been to dismiss workers who are affected by HIV/AIDs. The industry's fragmented nature, low barriers to new entrants, high casualisation rates (60% of its workers are from the informal sector), the prevalence of subcontracting and the emergence of many small contractors all increase the complexity of developing an effective strategy which targets all of those employed.⁶⁷ The construction industry also prioritises occupational safety rather than health issues, which directly impacts the support health related programs receive.⁶⁸ Efforts by civil society in this area have also only brought about patchy results.

⁶⁶ See also Middleton, C. (2005) "Interview with Michael Spicer, Chief Executive, South Africa Foundation" *Journal of Corporate Citizenship*, 18, 21 – 24

⁶⁷ Meintjes, I. Bowen, P & Root, D. (2007) "HIV/AIDS in the South African Construction Industry: Understanding the HIV/AIDS discourse for a sector specific response" *Construction Management and Economics*, 25, 3, 255 – 266

⁶⁸ Meintjes, I. Bowen, P & Root, D. (2007), at 259. For empirical studies on the impact of HIV/AIDS in the construction sector in South Africa, see Deacon, C. & Smallwood, J. (2003) "Health promotion in South African construction", *Journal of Construction Research*, 4, 2, 129 – 140, Haupt, TC & Smallwood, J. (2004), "HIV and AIDS in SA construction: attitudes and perceptions of workers", *Journal of Construction Research*, 5, 2, 311–327, Haupt, TC, Munshi, M & Smallwood, J, (2005) "HIV and AIDS in South African construction: is age nothing but a number?" *Construction Management and Economics*, 23, 1, 107 – 130, Haupt, TC, Deacon, C &

A further hindrance to the development of effective strategies to counter HIV/AIDS has been ambivalence toward HIV/AIDS management on the part of the government itself.⁶⁹ It has therefore been argued that the government must introduce a compulsory, industry wide initiative to tackle the problem. This, it has been suggested by experts, should involve education, testing and treatment programmes, supported through formal certification and funded through levies.⁷⁰

3.3 THE MINING SECTOR AND SAFETY: CONTINUING FUNDAMENTAL ISSUES

South Africa has some of the world's most dangerous mining operations because of the labour intensive methods used. Fatality and injury rates (caused by blasting, drilling, tremors and rock falls) are three times the equivalent in countries such as Canada and Australia – although South Africa has similarly

Smallwood, J. (2005), "Importance of healthy older construction workers", *Acta Structilia*, 12, 1, 1–19.

⁶⁹ "Aids experts condemn SA minister" 6 September 2006, at <<http://news.bbc.co.uk/1/hi/world/africa/5319680.stm>>, "New HIV row as South African who shunned drugs dies" 26 May 2006, at <<http://www.guardian.co.uk/world/2006/may/26/southafrica.aids>>, "South African government ends Aids denial" 28 October 2006, at <<http://www.guardian.co.uk/world/2006/oct/28/southafrica.aids>>, "A President in denial, a ravaged nation denied hope" 10 August 2007, at <<http://www.independent.co.uk/news/world/africa/a-president-in-denial-a-ravaged-nation-denied-hope-460967.html>>, PS Jones, (2005), "A Test of Governance: Rights Based Struggles and the Politics of HIV/AIDS policy in South Africa" *Political Geography*, 24, 4, 419 – 447, FG McNeill, (2009) "Condoms Cause Aids: Poison, Prevention and Denial in Venda, South Africa" *African Affairs*, 108, 432, 353 – 370, SC Kalichman, (2009), *Denying AIDS: Conspiracy Theories, Pseudoscience, and Human Tragedy*, Springer Science + Business Media.

⁷⁰ Bowen, P. Dorrington, R. Distiller, G. Lake, H. & Besesar, S. (2008) "HIV/AIDS in the South African construction industry: an empirical study" *Construction Management and Economics*, 26, 8, 827 – 839

stringent occupational health and safety laws.⁷¹ Despite continuing discussion, target-setting and the enactment of new laws, about two hundred workers still die annually in South African mines.⁷² Many companies defend themselves by arguing that they have taken steps to minimise fatalities and maximise safety – such as through training, implementation of strict safety policies and investing in world class technology to enhance mine security systems. The blame is placed on workers for not complying with safety procedures. Unions, on the other hand, point out that companies have prime responsibility for safety under the law and accuse them of not fully accepting that responsibility. Unions have not only demanded stricter penalties against companies for mining accidents, but have also called for pay rates to be structured so that workers receive a larger basic wage and less bonus-related income. The key issue here is that workers take more risks when their income is largely determined by bonus. Increased basic wages have however, been opposed by companies on the grounds that workers paid a

⁷¹ “Unsafe Behaviour is Normal Behaviour” *Finweek*, 2/28/2008, p 91

⁷² A recent safety audit released in South Africa showed that overall mine safety was running at an average of just 66%. See “South Africa Mine Deaths Continue to Rise” ICEM in Brief, 4 May 2009, at <<http://www.icem.org/en/78-ICEM-InBrief/3186-South-Africa-Mine-Deaths-Continue-to-Rise>>, “Gold Fields Struck by 5 SA Mining Deaths in past month” ICEM in Brief, 29 June, 2009 at <<http://www.icem.org/en/97-Sustainable-Development-Health-and-Safety/3281-Gold-Fields-Struck-by-5-South-African-Mining-Deaths-in-Past-Month>>, Creamer, M. “Mine deaths worsening, Section 28 artisans in many accidents” 17 March 2009, at <<http://www.miningweekly.com/article/mine-safety-slumps-as-more-die---num-2009-03-17>>, “More Deaths Inside and Outside of SA’s Mines” ICEM in Brief, 22 September 2008, at <<http://www.icem.org/en/25-Sub-Saharan-Africa/2774-More-Deaths-Inside-and-Outside-of-South-Africa%E2%80%99s-Mines>>.

higher basic wage would have no incentive to work efficiently.⁷³

Some limited progress has been made. The state recently passed laws to enhance mine safety. They provide that mine safety investigations must be carried out within ten days of accident occurrence and that reports must be issued within 30 days. They also give mine safety inspectors new powers. Controversially, the new laws expose company executives to a five-fold increase in fines and penalties if convicted of responsibility for health and safety accidents or deaths.⁷⁴ The mining industry has criticised these laws as punitive.⁷⁵ Nevertheless, neither companies nor the state are prepared to move on the fundamental issue of wage composition despite its importance and the fact that many companies operating in the developed world have tackled it⁷⁶. The government is understandably reluctant to intervene in company decisions on systems of wage payment. Yet the equally important question of increased rights for worker safety representatives, considered by leading experts on mining safety as key to reducing death and injury, remains unresolved. These international experts argue, with the unions, that employee safety representatives

⁷³ Ryan, B. (2008), "Minefield" *Finweek*, May 15, 2008, 14 – 16

⁷⁴ See "South African Parliament Passes Mine Safety Reform; Year-long Safety Audit Still Held-up" ICEM in Brief, 1 December 2008, at <<http://www.icem.org/en/97-Sustainable-Development-Health-and-Safety/2871-South-African-Parliament-Passes-Mine-Safety-Reform;-Year-long-Safety-Audit-Still-Held-up>>

⁷⁵ See Bearak, B. "South Africa is aiming to ease dangers of gold mining" 21 November 2008, at <<http://www.nytimes.com/2008/11/21/world/africa/21iht-21goldmine.18022573.html>>

require stronger powers than they currently enjoy if the level of fatalities is to be reduced.⁷⁷

3.4 BLACK ECONOMIC EMPOWERMENT

After apartheid, the government established policies to enhance ‘black economic empowerment’ (BEE), a matter relevant both to employees and potential employees. BEE is regulated by laws, non binding codes of practice and industry charters. The most important is the Broad-Based Black Economic Empowerment Act 2003.⁷⁸ Section 1 of the Act defines black economic empowerment as:

“... the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socioeconomic strategies, that include, but are not limited to:

- a) increasing the number of black people that manage, own and control enterprises and productive assets;
- b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
- c) human resource and skills development;,,
- d) achieving equitable representation in all occupational categories and levels in the workforce;
- e) preferential procurement; and
- f) investment in enterprises that are owned or managed by black people.”

Codes of practice have been issued under the Act to promote its objectives; namely to transform South Africa's economy to

⁷⁶ See note 69.

⁷⁷ Johnstone, R. Quinlan, M. & Walters, D. “Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market” (2005), *Journal of Industrial Relations*, 47, 1, 93 – 116

⁷⁸ The Act may be viewed at
<<http://www.info.gov.za/view/DownloadFileAction?id=68031>>

allow meaningful participation by black people. *Inter alia*, this entails substantially changing the racial profile of companies' owners, managers and skilled professionals, increasing the ownership and management of companies by black women, communities, workers, cooperatives and others, and helping them access more economic opportunities. It also involves promoting investment that leads to broad-based and meaningful participation in the economy by black people, helping rural and local communities access economic opportunities and promoting access to finance.⁷⁹ Some industries (e.g. mining, construction, transport, financial, tourism and energy) have signed their own “charters” specifying how companies should meet BEE objectives.⁸⁰ Under the 2003 Act, companies are encouraged to act to promote BEE strategies and to agree to be evaluated against specific scorecards.⁸¹ Although BEE is voluntary for companies, there are clear incentives for them to meet its objectives: BEE ‘points’ are taken into consideration by the government (in some cases a requirement) when companies

⁷⁹ For more information on the codes see
<<http://www.southafrica.info/business/trends/empowerment/BEE-codes.htm> > .

⁸⁰ McAllister, A & Ramjee, N. “Companies Doing Business In South Africa: How Does Black Economic Empowerment Affect You?” at <<http://www.bowman.co.za/LawArticles/Law-Article.asp?id=1001950359>> Arya, B. & Bassi, B. (2009), “Corporate Social Responsibility and Broad-Based Black Economic Empowerment Legislation in South Africa: Codes of Good Practice”, *Business & Society*, doi:10.1177/0007650309332261 .

⁸¹ The scorecards measure the BEE status of a company (direct empowerment, ownership and management of enterprises and assets, human resource development through skills development and employment equity, indirect empowerment in the form of preferential procurement and enterprise development), giving it a score out of 100. The charters and scorecards for various industries in South African can be viewed at <<http://www.workinfo.com/BEE/index.htm#Sector%20Charters%20and%20Scorecards> >

tender for business, apply for licences and concessions, enter into public-private partnerships, or buy state-owned assets. Thus, companies with higher BEE scores will enjoy preference in these instances.⁸²

However, the evidence shows that BEE policies have failed to enhance black economic empowerment and may in fact have discredited the concept. Research indicates that the gap between rich and poor has grown since 1994, and that within the black community itself, inequality has increased significantly. Thus far, the main beneficiaries of empowerment transactions have been a small number of black business people. Moreover, despite attempts to ensure employment equity, the black community is still under-trained and seriously under-represented in top and senior management posts. Thirdly, efforts to increase black share ownership in companies listed on the Johannesburg Securities Exchange have brought disappointing results.⁸³

It has been suggested that a major reason for BEE's failure is that it has not been regarded as an issue which needs to be addressed and directed by the state but has been allowed to

⁸² FW de Clerk Foundation, "Transformation and Black Economic Empowerment in South Africa, April 2006" at http://www.fwdklerk.org.za/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=71126&cat_id=1596 > , Altman, M. (2006), "Wage Determination in South Africa – What do we know?" *Transformation*, 60, 58 – 89 (discussing efficient and equitable wage determination), Makgetla, N. (2006), "BEE and Class Formation" *New Agenda*, 22, 47 – 58 (discussing employment equity), Valodia, I. Lebani, L. Skinner, C. & Devey, R. (2006), "Low Waged and Informal Employment in South Africa" *Transformation*, 60, 90 – 126 (assessing the state of knowledge of the labour market in South Africa)

operate in a framework effectively directed by the corporate sector. The effects of privatization and other related policies effectively took control over BEE away from the government and placed it in the hands of the corporate sector. Some have dubbed this the ‘managerialisation’ of BEE, arguing that the shifting of responsibility for achieving BEE objectives to companies has defeated its redistributive intentions.⁸⁴ BEE has been treated as a framework to be managed according to the voluntary principles of Corporate Social Responsibility, rather than as one of the responsibilities of an elected government.⁸⁵ Without the government imposing mandatory compliance, the decision to give effect to BEE strategy hinges on a cost-benefit analysis by companies to determine if compliance will bolster their profits.⁸⁶ As a result, the black population continues to be disenfranchised in areas such as land, employment and skills development.⁸⁷

⁸³ FW de Clerk Foundation, *ibid.* at 15 – 32

⁸⁴ Ponte, S. Roberts, S. & van Sittert, L. (2007) “Black Economic Empowerment, Business and the State in South Africa”, *Development and Change*, 38, 5, 933 – 955, at 934 – 935, 937, 950.

⁸⁵ See also Harrison, R. “Moeletsi Mbeki: Black empowerment has failed” 19 June, 2009, at <<http://www.mg.co.za/article/2009-06-19-moeletsi-mbeki-black-empowerment-has-failed>> . For an argument that the political system in the UK is similarly unresponsive to employees, see Sikka, P. “Corporate Governance: What about the Workers?” (2008), *Accounting, Auditing & Accountability Journal*, 21, 7, 955 – 977. Despite allusions to “principles” based corporate governance there are no corporate structures, policies or processes to achieve an equitable distribution of income and wealth (at pg. 970).

⁸⁶ E Hoffman, (2008), “A Wolf In Sheep's Clothing: Discrimination Against The Majority Undermines Equality, While Continuing To Benefit Few Under The Guise Of Black Economic Empowerment”, *Syracuse Journal of International Law and Commerce*, 36, 87 – 115 , at 99 – 101

⁸⁷ See also Tangri, R. & Southall, R. (2008), “The Politics of Black Economic Empowerment in South Africa” *Journal of Southern African Studies*, 34, 3, 699 – 716 which discuss how reconciling BEE objectives

Thus, in each of our important cases, relying on companies themselves to take care of the needs of employees has brought limited results. In themselves, the concepts of ‘inclusivity’ ‘corporate social responsibility’ ‘good corporate citizenship’ (so heavily promoted in the corporate sector by the King Codes) have not resolved the significant difficulties which employees face. Given the similar ‘soft law’ nature of King III, it is likely that its impact will be similarly restricted.

What of the potential offered by the new Companies Act 2008 for companies to address the needs of employees? We discussed the possibilities it offers employees to protect themselves when their interests are harmed (declaration of delinquency and probation, business rescue proceedings and derivative actions) above.

We argue that their potential in guarding the position of employees is also limited. Firstly, the Act introduced an interesting new regime in terms of which directors may be (i) declared delinquent or (ii) placed on probation as a result of certain conduct. But the ability of employees to apply for such a declaration only arises in very narrow circumstances, i.e. likely only in cases of extreme misconduct by the director. Secondly, under the Act, the decision to initiate business rescue proceedings is no longer a decision to be made solely by the board. It has, for the first time, extended this decision to

with capitalist-led economic growth remains problematic for the government.

employees and allows them to participate in these proceedings. It is entirely possible that a trade union will make such an application where, for example, a multinational wished to cease operations in South Africa and wanted to liquidate its South African subsidiary. But again, this is a very narrow right, exercisable only when the company is in financial difficulty. Thirdly, despite the ability of employees to commence derivative actions against the board, there are significant procedural hurdles they must overcome before leave to apply is granted. Section 165(5) provides that the court may grant leave only if, it is satisfied that the applicant is acting in good faith, that the proposed or continuing proceedings involve the trial of a *serious question of material consequence* to the company and that it is in the *best interests* of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be. These may be very difficult for employees to prove, especially where the board is unlikely to share information with them. Given that the derivative action is traditionally viewed as an action of last resort in addressing the behaviour of directors,⁸⁸ it remains to be seen to what extent the courts will be willing to depart from this approach. In addition, under the ‘business judgement rule’, directors will have satisfied their duties if they took reasonably diligent steps to become informed about the matter, had no material financial interest in the matter or had properly disclosed such interest, and made a decision rationally in the belief that it was in the best interests of the company.⁸⁹

⁸⁸ The rule in *Foss v Harbottle* (1843) 67 ER 189

⁸⁹ s76(4) Companies Act 2008

4. CONCLUSION

Trends in South African corporate governance show a move toward an ‘inclusive approach’ to company management. These are evidenced both in corporate governance ‘soft’ as well as ‘hard’ law. Viewed in international perspective these have certainly been distinctive in the rights that they give employees and their representatives. However, as our case studies have shown, company reactions to date have, even in the face of very serious problems, been uneven at best. The combination of ‘soft’ and ‘hard’ law are unlikely to yield the hoped-for results. It remains to be seen how the courts will interpret the new law. Nevertheless, progress in improving employees’ position seems likely to continue to be slow and uneven unless the state takes a more direct role in overseeing company actions and advancing employee interests.

We therefore join with other scholars in calling for the state to enact further ‘hard law’, transcending the limited areas covered in the Companies Act and the ‘soft law’ in the King Codes. Further ‘hard law’ in support of employee rights is required for three distinct reasons. First, it can set high standards for companies to follow, or at least provide incentives for them to attain these standards. It can be enforced against errant companies through the imposition of a variety of penalties – fines, imprisonment, suspension of licences, injunctions and institution of criminal proceedings. Serious financial and

reputational consequences may follow from the use of these powers against non compliant companies.⁹⁰ Core issues such as meeting labour and human rights standards can be more comprehensively, clearly and unambiguously regulated.⁹¹ Secondly, hard law can provide benchmarks defining and crucially, accurately *measuring* the developmental impact of ‘CSR’. Existing measures (case studies, company level assessments, evaluations by civil society, and international ratings and rankings) provide only partial pictures of the impact of CSR actions, due to low data reliability, diverse and complex methodologies and a lack of comparability between methods.⁹² Clear legal standards on the other hand, make it possible to monitor compliance, control corruption and detect unethical behaviour. Thirdly, strong laws which are adequately enforced build state legitimacy; conversely non functioning legislation undermines it.⁹³ An array of hard law to provide housing, health and education, tackle corruption, enforce labour standards, protect human rights, prevent resource depletion and control

⁹⁰ Lynch-Fannon, I. (2007) “Corporate Social Responsibility Movement and Law's Empire: Is There a Conflict?” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988944, McInerney, T. “Putting Regulation Before Responsibility: Towards Binding Norms of CSR” 2007, *Cornell International Law Journal*, 40, 171 – 200.

⁹¹ McInerney, (2007), at 184 – 190, International Council on Human Rights Policy, “Beyond Voluntarism” 2002, 1 – 16 at http://www.ichrp.org/files/summaries/7/107_summary_en.pdf, R Barkmeyer, “Legitimacy as a Key Driver and Determinant of CSR in Developing Countries” Paper for the 2007 Marie Curie Summer School on Earth System Governance, 28 May – 06 June 2007, Amsterdam, 1 – 23, at <http://www.2007amsterdamconference.org/Downloads/07SummerSchool%20-%20Barkemeyer.pdf>, Nwete, B. (2007), UE Ite, “Multinationals and CSR in developing countries: a case study of Nigeria” 2004, *CSR And Environmental Management*, 11, 1, 1 – 11

⁹² Hamann, R. (2007) “Is Corporate Citizenship Making a Difference?” *Journal of Corporate Citizenship*, 28, 15 – 29, at 17 & 22

⁹³ McInerney, 2007, at 193 – 194

industrial pollution already exists in South Africa.⁹⁴ The challenge is therefore to enforce these laws in order to meet socio-economic needs.

We do not argue for regulatory formalism. Rather, enforcement may be conducted through sophisticated modern approaches as recommended by regulation experts. The now widely-accepted principles of ‘responsive regulation’ emphasise the importance of regulators starting at the persuasive base of a pyramid of sanctions and responding to companies’ behaviours as appropriate. The importance of taking account of a wide range of contextual considerations, of using persuasion and of educational work with companies have also been cogently argued and should not be neglected. Experts nevertheless also agree that a robust set of sanctions must be available to regulators.⁹⁵

A political intervention is under way in South Africa to broaden the legal duties of directors and improve employee rights. We

⁹⁴ They include the Employment Equity Act 1998, Skills Development Act 1998, Mine Health and Safety Act 1995, National Water Act 1998, National Environmental Management Act 1998, Broad Based Black Empowerment Act 2003, Air Quality Bill 2003. See Visser, W. “Corporate Citizenship in South Africa: A Review of Progress Since Democracy” (2005), *Journal of Corporate Citizenship*, 18, 29 – 38.

⁹⁵ The influential ‘responsive regulation’ concept was initiated by I. Ayres and J. Braithwaite in *Responsive Regulation. Transcending the Regulation Debate*, Oxford University Press. (1995). On recent developments in the influential approach see Baldwin, R & Black, J. “Really responsive regulation” (2007) LSE Law, Society and Economics working paper, 15/2007, Department of Law, LSE, London. On the importance of penalties, see Metcalf, D. “Why Has the British National Minimum Wage Had Little or No Impact on Employment?” Centre for Economic Performance Discussion Paper 781, LSE, London.

have questioned whether corporate ‘soft’ and ‘hard’ law are the most appropriate vehicle through which to promote the interests of employees. Despite the *optimism* which they have generated, they in fact appear insufficient to tackle the difficulties which employees face. More hard law and better enforcement of the laws that exist will be required if government’s aims to improve levels of social justice are to be realised.